PD-0287-20
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 10/20/2020 4:13 PM
Accepted 10/21/2020 9:47 AM
DEANA WILLIAMSON
CLERK

PD-0287-20

IN THE TEXAS COURT OF CRIMINAL APPEALS
AT AUSTIN

FILED
COURT OF CRIMINAL APPEALS
10/21/2020
DEANA WILLIAMSON, CLERK

NO. 14-17-00400-CR
In the Court of Appeals for the Fourteenth District of Texas

No. 1096930
In the 184th District Court of Harris County, Texas

HAPPY TRAN PHAM,
Appellant

V.

THE STATE OF TEXAS,
Appellee

PETITIONER-APPELLANT'S INITIAL BRIEF

BRITTANY CARROLL LACAYO
Texas Bar No. 24067105
Lacayo Law Firm, PLLC
212 Stratford St.
Houston, Texas 77006
Telephone: (713) 504-0506
Facsimile: (832) 442-5033
Email: Brittany@bcllawfirm.com

COUNSEL FOR PETITIONER-APPELLANT

IDENTITY OF PARTIES AND COUNSEL

APPELLANT:	Happy Pham TDCJ 02135956 Telford Unit, TDCJ 3899 Hwy 98 New Boston, TX 75570
PRESIDING JUDGE AT TRIAL:	Hon. Jan Krocker 184th District Court Harris County, Texas 201 Caroline, 10th Floor Houston, Texas 77002
DISTRICT ATTORNEY:	Kim Ogg District Attorney Harris County, Texas 500 Jefferson St. Houston, TX 77002
TRIAL PROSECUTORS:	Ryan Trask State Bar No. 24086812 Assistant District Attorney Clint Morgan State Bar No. 24071454 Keri Fuller State Bar No. 24043666 Harris County, Texas 500 Jefferson St. Houston, TX 77002
DEFENSE ATTORNEYS AT TRIAL:	Sean Buckley State Bar No. 24006675 Sean Buckley & Associates 770 South Post Oak Lane, Suite 620 Houston, Texas 77056 Gary Tabakman State Bar No. 24076065

	712 Main Street, Suite 2400 Houston, Texas 77002
STATE'S COUNSEL FOR MOTION FOR NEW TRIAL:	Ryan Trask State Bar No. 24086812 Assistant District Attorney Harris County, Texas 500 Jefferson St. Houston, TX 77002
DEFENSE COUNSEL FOR MOTION FOR NEW TRIAL:	Steven Lieberman State Bar No. 12334020 712 Main Street, Suite 2400 Houston, Texas 77002
STATE'S COUNSEL FOR APPEAL:	Eric Kugler State Bar No. 00796910 Assistant District Attorney Harris County, Texas 500 Jefferson Houston, TX 77002
DEFENSE COUNSEL FOR APPEAL:	Brittany Carroll Lacayo State Bar No. 24067105 Lacayo Law Firm, PLLC 212 Stratford St. Houston, TX 77006

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Constitutions, Statutes and Other Authorities

STATEMENT OF THE CASE

On March 16, 2007, Appellant was charged by Indictment in Case No. 1096930 with the felony offense of Murder in the 184th Judicial District Court of Harris County, Texas. (C.R. at 21). A jury trial began on May 1, 2017, Appellant was convicted on May 8, 2017, and his punishment was assessed by the jury as life in prison on May 9, 2017. (III R.R. at 1; VII R.R. at 42; IX R.R. at 6-7).

On June 7, 2017, appellant timely filed Defendant's Motion for New Trial and Request for Evidentiary Hearing. (C.R. at 297). Appellant timely presented the Motion for New Trial pursuant to TEX. R. APP. P. 21.4(a) on June 15, 2017. (C.R. at 367). On June 15, 2017, the court denied appellant's request for a hearing and denied the Motion for New Trial. (C.R. at 368). He appealed to the Fourteenth Court of Appeals. The Fourteenth Court of Appeals issued its published opinion affirming the trial court's judgment on October 31, 2019. *Pham v. State*, 595 S.W.3d 769 (Tex. App. – Houston [14th Dist.] 2019, pet. granted). Justice Frances Bourliot issued a dissenting opinion. Mr. Pham filed a Motion for Rehearing En Banc, which was denied on March 5, 2020 (Justices Hassan and Poissant would grant). The Court granted review on three of the four grounds presented in in the Petition for Discretionary Review.

ISSUES PRESENTED

1. Whether an attorney provides ineffective assistance when he admits in an affidavit that he failed to interview any potential mitigation witnesses, he made conclusory assumptions about what those witnesses might know about appellant's life, and his decision not to interview any potential witnesses was not based on trial strategy.

2. Whether trial counsel's failure to investigate even a single avenue of mitigation means that appellant was constructively denied any defense at all in the penalty phase of his trial and therefore prejudice is presumed.

3. Whether the Court of Appeals erred by holding that because appellant used deadly force, rather than the threat of deadly force, he was not entitled to an instruction on self-defense pursuant to Tex. Pen. Code § 9.04.

STATEMENT OF FACTS

While Thuy Le ("Le") was dating the complaining witness, Pierre Mai ("Mai"), Le cheated on Mai with Happy Pham ("Pham"). (IV R.R. at 86-89; VI R.R at 61, 58). After Pham and Le dated for several months, they mutually decided to end their relationship, and Le wanted to get back together with Mai. (IV R.R. at 91-94; VI R.R. at 61). Although Pham tried to contact Le after their break-up, he did not make any attempts to contact her for weeks leading up to the incident. (IV R.R. at 116-17). On December 13, 2006, Le and Mai met some friends at a restaurant off Bellaire called the Cajun Kitchen to eat crawfish. (IV R.R. at 96). At the time this incident occurred, Le considered herself and Pham to still be friends. (IV R.R. at 117).

State's Allegations

The State claimed that members of Pham's family were also in the restaurant eating, and they told Pham that Le was there with Mai. (VI R.R. at 89-91). The State's case was that Pham walked into the restaurant, pulled out the gun he carries by his side, pointed the gun at Mai and said, "Motherfucker, you in my hood" or "What the fuck you doing in my motherfucking hood?" or "Bitch, you're in my hood" and shot Mai in the chest. (IV R.R. at 13, 101, 131-32, 155). Le claims that when she heard the first shot Mai was still sitting down. (IV R.R. at 103). Le testified that Mai never pulled a gun and pointed it at Pham. (IV R.R.

at 103). Le testified that Mai did not carry a gun; however, she admitted that on December 15, 2006, she told Detective Nabors that Mai did carry a gun. (IV R.R. at 111, 114). Le testified that she did not see a gun on the floor near Mai; however, on cross-examination, she admitted that that was not true, and that after the shooting, she did see a gun on the floor next to Mai. (IV R.R. at 114-15).

Huy Thai ("Thai"), Mai's friend, testified that he did not see Mai pull a gun. (IV R.R. at 134). However, he also testified that he did not see Pham shoot Mai because he was running for the gun. (IV R.R. at 136).

Thai originally testified that he did not know Mai to carry a gun. (IV R.R. at 131). However, he later testified that he did know Mai to carry a black gun and he has seen it before. (IV R.R. at 134). He later clarified that he meant that he knew Mai owned a gun but did not carry the gun. (IV R.R. at 134-35). Thai admitted that he may have told Sergeant Wyers in an interview on December 19, 2006 that Mai did carry a gun, but maybe not all the time. (IV R.R. at 146). Thai identified State's exhibit no. 39 as Mai's gun. (IV R.R. at 136). The State did not contest that the gun that was found belonged to Mai. (V R.R. at 165). Thai saw Mai's gun right after the shooting occurred, and his gun was right next to him on the ground. (IV R.R. at 139). Thai did not see how it ended up on the ground. (IV R.R. at 139).

As Mai falls over, the State claims Pham fired a second bullet, which goes

right through Mai's legs. (IV R.R. at 13). Afterwards, Pham walks out of the restaurant and started running after he grabbed the handle on the exit door. (IV R.R. at 122, 159). Mai was slouching at his chair, leaning towards the fish tank. (IV R.R. at 163). They moved all of the tables and helped him to the floor. (IV R.R. at 163).

Thomas Tran ("Thomas") observed that Mai was close friends with his uncle. (IV R.R. at 173). Thomas's aunt owned the Cajun Kitchen. (IV R.R. at 174). Thomas also understood that Thai was dating his Aunt Kerry, and they were there that night with Mai. (IV R.R. at 174). Thomas shot at Pham from the front of the restaurant as Pham was in the parking lot following the shooting. (V R.R. at 43). There was a concern at one point regarding whether Thomas, himself, committed a crime by shooting at Pham who was leaving. (V R.R. at 44). Based on the investigator's decision that Thomas was shooting towards Pham in self-defense, he determined that Thomas did not commit a crime. (V R.R. at 45). He based that decision on Thomas's statement that he thought Pham had a gun and might be pointing it towards him. (V R.R. at 45). Thomas was the one who picked up the gun near Mai and "preserve[d]" the gun at the scene and gave it to the officer when the officer arrived. (IV R.R. at 164-65; V R.R. at 49).

There are surveillance videos of part of what occurred at the restaurant. (IV R.R. at 13). When Wyers appeared at the scene, he was not happy when he

observed the employees and cooks watching the surveillance videos. (V R.R, at 13-14). The machine did not use CDs and DVDs, it was just a computer, and Wyers depended on the owner of the restaurant to produce the videos to him. (V R.R. at 14-15, 31). The owner gave the investigator two CDs that he was able to copy on the scene, and a third days later. (V R.R. at 29, 46-47). They did not retrieve a copy of the hard drive from the computer system. (V R.R at 33). Law enforcement did not check to see how many wires were coming in to the system. (V R.R. at 52). The investigator did not know how many actual angles are fed into the system. (V R.R. at 33). As conceded by the investigator, the integrity of the evidence depends on the integrity of the person who gave it to him. (V R.R. at 35). However, the videos produced do not show when Pham takes out his gun and shoots, Mai failing over, or Mai's actions during the incident. (V R.R. at 17; State's Exhibit Nos. 41 and 42). After the incident, Pham was not arrested for 10 years. (IV R.R. at 14).

Pham's Defense

Approximately four to six months before the incident occurred at the Cajun Kitchen on December 13, 2006, Pham was with some friends at a lounge in Houston called Window Café when he noticed someone coming in his direction. (VI R.R. at 65). It was Mai and he was intoxicated. (VI R.R. at 65). Mai made eye

contact with Pham and started trying to punch Pham, swinging at Pham until the police stopped him. (VI R.R. at 65-66).

On Halloween night, October 31, 2006, Pham went to Magic Island for a Halloween party. (VI R.R. at 67). About fifteen to twenty of Mai's friends were coming downstairs, and one of them, Tom, stepped to Pham's side of the stairwell and bumped into him. (VI R.R. at 69). After Tom bumped Pham, they started fighting and Thai and everyone else jumped in. (VI R.R. at 69). Pham ended up on the floor with ten to fifteen people surrounding him. (VI R.R. at 69). Some of Pham's friends saw it and came over with security and separated everyone. (VI R.R. at 70). Pham thought it was over. (VI R.R. at 70). Then Pham felt a beer bottle hit his face and blood was everywhere. (VI R.R. at 70). As a result of the injury, Pham had thirteen stiches on his forehead. (VI R.R. at 70). He knew the people that assaulted him were Mai's friends from past social events. (VI R.R. at 71). Thai associated with a gang called "NCP," which stood for "Northside Chink Posse." (VI R.R. at 71-72). It was well known in the community that Mai was associated with NCP. (VI R.R. at 72). Pham recognized individuals the night of the assault that were associated with NCP. (VI R.R. at73). During the trial, Thai admitted to getting into what he referred to as a "little scuffle" with Pham on Halloween in 2006. (IV R.R. at 127).

Pham owned a gun that was given to him by one his best friends before that friend left for Iraq and passed away from an IUD. (VI R.R. at 74). He would carry this gun from time to time before the incident on Halloween in 2006, but he carried it more frequently after that incident occurred. (VI R.R. at 74).

In the fall of 2006, before the incident occurred at the Cajun Kitchen, Pham heard about Mai and Thai being involved in a drive-by shooting. (VI R.R. at 75-76). Pham observed the vehicle riddled with bullets. (VI R.R. at 76).

The defense asserted that Pham did not commit murder when he shot Mai; instead, he was acting in self-defense. Early on the afternoon of December 13, 2006, Pham's cousin, Mike Tran ("Tran")(not to be confused with Thomas Tran) and Tran's girlfriend, Mai Pham invited Pham out that night to the Cajun Kitchen to join his family for dinner. (VI R.R. at 77).

Phone records and the testimony of Devon Le ("Devon") revealed that at approximately 5:25 that afternoon, Pham called Devon and asked him if he wanted to go eat dinner with him, his cousin, and their family at the Cajun Kitchen. (VI R.R. at 78-88). Devon could not go with Pham because he had traffic court. (VI R.R. at 88). These phone calls were made before Pham had any idea that Mai was planning on going to the Cajun Kitchen that night. (VI R.R. at 89). After finding out that neither Le or Pham's brother could go with him to the Cajun Kitchen, Pham was going to stay home. (VI R.R. at 90). He changed his mind when Billy

Yang ("Yang") called Pham after he got off work and came to Pham's house. (VI R.R. at 90). Yang told Pham to jump in the shower and they would go out. (VI R.R. at 90). Pham notified Yang that his cousin, Tran, invited him to go eat and so they decided to go to the Cajun Kitchen. (VI R.R. at 91). After Pham had already left the house, and was in the car, he observed a text message from Mai Pham, Tran's girlfriend, letting Pham know that Mai was at the Cajun Kitchen. (VI R.R. at 89-91). This information placed Pham on guard, but Pham was "over the situation" and did not go to the Cajun Kitchen expecting to get into a gunfight with anyone. (VI R.R. at 92). Since Le decided to get back together with Mai, Pham thought the situation was "basically over." (VI R.R. at 92). Pham parked in the first available parking spot he saw, which was not a strategical decision because he would have to be careful when exiting or he would "rip off" his bumper. (VI R.R. at 93-94). He did not leave his car running. (VI R.R. at 95). He made no attempts to disguise his vehicle or alter the identification marks or license plate of his vehicle. (VI R.R. at 96). Pham made no attempts to disguise himself. (VI R.R. at 96). He carried his firearm because he was on guard that Mai was there, but he did not expect to have to use the firearm that night. (VI R.R. at 97). Pham walked in and saw Thai sitting at the table with Mai (VI R.R. at 99; IV R.R. at 118-19). Pham did not know until he entered the restaurant that Thai was also there. (VI R.R. at 161). Thai came with his girlfriend, Kerry, whose sister owned the Cajun

Kitchen. (IV R.R. at 118, 145). Thai testified that the restaurant was "like [his] family restaurant" and he knew they had a gun underneath the cash registers. (IV R.R. at 132).

Pham said "what's up" towards Tran's direction (not talking to Mai or Thai) and then heard commotion, like chairs on tile coming from the area where Mai was sitting. (VI R.R. at 15, 103). Pham saw Thai jumping up, and he had already observed Mai reaching into his waistband for his weapon when he walked into the door, so Pham drew his weapon. (VI R.R. at 103-04, 110). He drew his weapon to discourage a conflict. (VI R.R. at 104). At that point, he redirected his attention to Thai and saw that Thai already had his black hoodie lifted up. (VI R.R. at 105). Pham's cousin, his cousin's girlfriend, and their child were in the restaurant and Pham did not want anything to happen. (VI R.R. at 105). Mai was struggling with his gun because there was a fish tank behind him, and he was trying to get up. (VI R.R. at 105). There was not a lot of space between the table and the fish tank. (VI R.R. at 105). Everything happened too quickly for Pham to be able to just turn around and run out of the restaurant. (VI R.R. at 105). He tried to discourage Mai, and was warning him. (VI R.R. at 106). Mai was lifting his gun towards Pham, and Pham had his weapon down. (VI R.R. at 107, Defendant's Ex. 10L). Pham was walking towards Mai hoping to deescalate the situation. (VI R.R. at 108). Tran saw Mai reach for his waist before he heard gunshots. (VI R.R. at 15-16). Mai had

his gun almost fully up and pointing at Pham, and Pham made the decision to use deadly force to avoid being shot. (VI R.R. at 110). At the point that Pham used deadly force, he did not feel that he had the ability to retreat because he "can't run faster than a bullet." (VI R.R. at 111). Tran did not see Pham do anything to provoke any kind of disagreement between himself and Mai before the shooting occurred. (VI R.R. at 16). Pham aimed low on the first shot and shot Mai's legs because although he was using deadly force he did not really want to kill Mai at this point. (VI R.R. at 112). Mai was falling back raising his gun towards Pham, and while Pham was staring down the barrel of Mai's gun, he fired his second shot at Mai, this time shooting Mai's chest. (VI R.R. at 112). He did not have time to reflect for a period of time before taking action, and used deadly force to avoid being shot. (VI R.R. at 112-13).

As Pham was running out of the Cajun Kitchen he heard at least six or seven gunshots behind him, so he ducked behind a car. (VI R.R. at 113). He didn't have the keys to his car, and he heard hissing sounds coming from his engine and observed bullet holes in the hood of his car. (VI R.R. at 114). Pham took off running because he did not know if they would continue shooting at him. (VI R.R. at 114). He ran straight to his cousin Tran's house. (VI R.R. at 114). When Tran confronted him about the shooting, Pham told him he shot in reaction to Mai pulling a gun on him. (VI R.R. at 17). A couple days later, Pham's family's friends

took him to Louisiana. (VI R.R. at 115). He stayed there from a few weeks to month at the most. (VI R.R. at 115). He was twenty-one years old, people were telling him to do different things, and he needed time to figure out what to do. (VI R.R. at 115). The news and rumors were painting a nasty picture of what happened, vilifying Pham and painting him as a coldblooded killer. (VI R.R. at 116, 118). This discouraged him from turning himself in. (VI R.R. at 118). He did not feel that he was going to get a fair trial, and wanted to come up with more evidence and locate more witnesses to paint a true picture of what happened. (VI R.R. at 116). He also heard rumors about the owners of the restaurant getting rid of the some of the angles of the videos. (VI R.R. at 116-17). As time went by, he felt being on the run was also hurting his case and making him look bad. (VI R.R. at 118). While he was avoiding the authorities, he did not have any way to maintain legitimate employment, so he was involved with selling marijuana. (VI R.R. at 120-21). If Pham could go back, he would have just stayed home that night. (VI R.R. at 122). However, at the moment he made the decision to use deadly force, he felt that it was absolutely necessary. (VI R.R. at 122-23).

SUMMARY OF THE ARGUMENT

An attorney provides ineffective assistance when he admits in an affidavit that he failed to interview any potential mitigation witnesses, he made conclusory assumptions about what those witnesses might know about appellant's life, and his decision not to interview any potential witnesses was not based on trial strategy. Additionally, trial counsel's failure to investigate even a single avenue of mitigation means that appellant was constructively denied any defense at all in the penalty phase of his trial and therefore prejudice is presumed. Lastly, the Court of Appeals erred by holding that because appellant used deadly force, rather than the threat of deadly force, he was not entitled to an instruction on self-defense pursuant to Tex. Pen. Code § 9.04.

ARGUMENT

1. An attorney provides ineffective assistance when he admits in an affidavit that he failed to interview any potential mitigation witnesses, he made conclusory assumptions about what those witnesses might know about appellant's life, and his decision not to interview any potential witnesses was not based on trial strategy.

2. Whether trial counsel's failure to investigate even a single avenue of mitigation means that appellant was constructively denied any defense at all in the penalty phase of his trial and therefore prejudice is presumed.

The United States and Texas Constitution entitled Mr. Pham to the effective assistance of counsel at the punishment phase of trial. *Wilkerson v. State,* 726 S.W.2d 542, 548 (Tex. Crim. App. 1986). To prevail on his claim of ineffective assistance of counsel, Mr. Pham must first show that counsel's performance was deficient in that it fell below an "objective standard of reasonableness ... under prevailing professional norms." *Strickland v. Washington,* 466 U.S. 668, 698 (1984). "Prevailing norms of practice as reflected in the American Bar Association standards and the like... are guides to what is reasonable." *Wiggins v. Smith,* 593 U.S. 510, 527 (2003); *Rompilla v. Beard,* 545 U.S. 374, 387 (2005)("[W]e have long referred [to these ABA Standards] as guides to determining what is reasonable."); 1 ABA Standards for Criminal Justice 4-4.1, commentary pp. 4-5 ("It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all

avenues leading to facts relevant to the merits of the case... "). He must then show that these errors were prejudicial - but for counsel's errors, there is a reasonable probability that the outcome would have been different. *Strickland v. Washington,* 466 U.S. at 692.This Court's concern is whether Pham received a fair trial, on punishment, one that resulted in an outcome worthy of confidence. *Kyles v. Whitley,* 514 U.S. 419, 430 (1995).

The prejudice Pham must demonstrate is by less than a preponderance of the evidence because "[t]he reasonable probability standard is not the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for [sic] error things would have been different." *United States v. Dominguez Benitez,* 542 U.S. 74, 82 n.9 (2004); *Strickland v. Washington,* 466 U.S. at 694-696 ("The result of a proceeding can be rendered unreliable, and hence, the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome."). Whether challenged conduct was strategic is a question of fact; whether it was objectively reasonable is not. *Strickland v. Washington,* 466 U.S. at 698 (ineffective assistance is not a question of "basic, primary or historical fact" and "both the performance and prejudice components of ineffectiveness inquiry are mixed questions of law and fact."). Even a single error on counsel's part is enough to warrant a finding of ineffective assistance. *Wood v. State,* 260

S.W.3d 146, 149 (Tex. App.—Houston [1st Dist.] 2008, pet. ref'd)(guilt or innocence stage); *Andrews v. State*, 159 S.W.3d 98, 103 (Tex. Crim. App. 2005)(punishment stage).

Any claimed tactical or strategic decision is entitled to deference only if supported by *informed* decisions. This court's principal concern is not whether counsel claims their challenged conduct was strategic in nature, "but rather whether the investigation supporting [their] decision... was itself reasonable. *Strickland* does not establish that a cursory investigation automatically justifies a tactical decision... " *Wiggins v. Smith*, 539 U.S. at 522-23. Counsel's "decision cannot be fairly characterized as 'strategic' unless it is a conscious choice between two legitimate and rational alternatives. It must be borne of deliberation and not happenstance, inattention or neglect." *Wood v. Allen*, 558 U.S. 290, 307 (2010)(Stevens, J., *dissenting)*, citing *Wiggins v. Smith*, 539 U.S. at 526-27.

"The sentencing stage of any case, regardless of the potential punishment, is the time at which for many defendants the most important services of the entire proceeding can be performed. Where the potential punishment is life imprisonment ... the sentencing proceeding takes on added importance." *Vela v. Estelle*, 708 F.2d 954, 964 (5th Cir. 1983). "Counsel must make a significant effort, based on *reasonable investigation and logical argument*, to

mitigate his client's punishment." *Patrasso v. Nelson,* 121 F.3d.297, 303-04 (7th Cir. 1997). Counsel had an ethical and professional duty to "present all available evidence and arguments to support the defense of [Pham]." *Jackson v. State,* 857 S.W.2d 678, 683 (Tex. App.—Houston [14th Dist.] 1993, no pet. ref'd); *State v. Thomas,* 768 S.W2d 335, 336 (Tex. App.—Houston 14th Dist.] 1989, no pet.); *see also Haynes v. Cain,* 272 F.3d 757, 764 (5th Cir. 2001)("The Sixth Amendment does not require counsel to invent a defense or act in an unethical manner. *It does, however, require counsel to put the prosecution's case to the test through vigorous partisan advocacy.*")(emphasis added).

After the State rested its case in chief at the punishment stage, trial counsel called two witnesses on Pham's behalf to attempt to mitigate punishment. As reflected in the affidavit of Dung Pham, the witnesses were completely unprepared to testify and ineffective. (C.R. at 351).

In trial counsel's affidavit, attached to his Motion for New Trial and Request for an Evidentiary Hearing, he stated,

> In my representation of Happy Pham, I was the sole attorney responsible for developing a defensive strategy and preparing the case for trial. Thus, I can speak wholly and exclusively on the issue of whether any actions I took or did not take, were pursuant to a trial strategy.
>
> In my evaluation of Happy Pham's case for trial, I came to believe that Mr. Pham had a strong case for self-defense. I anticipated a high likelihood of acquittal because I did not believe the State would be able to disprove Happy Pham's self-defense claim beyond a reasonable doubt. I furthermore believed that if the jury did not side with Happy Pham on

> the issue of self-defense during the guilt/innocence phase of the trial, the residual doubt and circumstances of the shooting as I interpreted them, would flow over into the punishment case and mitigate the sentence. Clearly, I miscalculated . . . I made a conclusory assumption that Happy Pham's friends and family who stayed in contact with him during the time he was hiding and selling marijuana would not have made good punishment witnesses because they would have been exposed to damaging cross-examination about their knowledge of Mr. Pham's activities during the time period of their relationships with him. As a result of my assumption to this effect, combined with my belief that the self-defense issues would sufficiently mitigate Mr. Pham's sentence if there was one, I made no effort to further investigate the possibility that punishment witnesses existed who could provide "net positive" punishment testimony on Mr. Pham's behalf. My failure to investigate the possibility that favorable punishment witnesses existed was not based on any trial strategy.' 'During the punishment phase of trial, I offered the testimony of two of Happy Pham's brothers, Long Pham and Dung Pham. I met with both witnesses prior to their testimonies, but my decision to offer their testimonies at the punishment phase was rushed and no in-depth preparation had been conducted.' . . . I had mixed feelings about using Mr. Pham's parents as punishment witnesses in the event of a conviction . . . rather that directing Mr. Pham to make his parents available for an interview with me so I could further assess their value as witnesses notwithstanding my initial concerns, I made the conclusory decision to passively acquiesce in Mr. Pham's desire to protect his parents, and move forward without investigation and/or developing Mr. Pham's parents as potential punishment witnesses. I did not advise Mr. Pham at any time that it could be more important to use his parents as witnesses than to protect their feelings and emotions. I had a clear duty to advise Mr. Pham of this and to further investigate his parents as potential punishment witnesses. My failure to do was not based on any trial strategy.

(C.R. at 331-32). Additionally, counsel for the motion for new trial also attached an affidavit from Happy Pham to the Motion for New Trial. (C.R. at 329). In his affidavit, he stated, that he did not have any meaningful discussion about the punishment phase of the trial, and that trial counsel never asked him for names and

contact information of witnesses that would have testify on his behalf during the punishment phase. (C.R. at 329-30). In his affidavit, he listed the names of character witnesses who he could have provided contact information for, if his defense counsel had requested him to, and that would have been willing and available to testify during his trial. (C.R. at 330). Moreover, counsel for the Motion for New Trial attached affidavits from those 19 witnesses who were available to testify on his behalf at the punishment stage of his trial who were neither interviewed nor called by counsel. (C.R. at 334-359). All were aware that Pham had been charged with murder, but were still willing to testify on his behalf at the punishment stage. (C.R. at 334-359). These people paint a compelling portrait of Pham as a good, kind, decent and caring man who was not a danger or threat to the safety of the community, and for whom they would have asked jurors to assess a minimal prison sentence by tempering justice with mercy. (C.R. at 334-359).

Counsel's professional and ethical responsibility encompasses the duty to locate, interview, and call potential punishment witnesses and the failure to do so constitutes ineffective assistance of counsel. *See Ex Parte Welborn,* 785 S.W.2 at 395; *Milburn v. State,* 190 S.W.3d 154, 165-66 (Tex. App. – Houston [1st Dist.] 2005, pet. ref'd). The Supreme Court has stated, "a failure to uncover and present mitigating evidence cannot be justified as a tactical decision when defense counsel has not conducted a thorough search of the defendant's background." *Wiggins v.*

Smith, 539 U.S. at 521. Texas courts have reaffirmed this mandate in holding that the failure to interview and call witnesses who are available to testify at the punishment stage and whose testimony would have been beneficial to the defendant cannot be sanctioned as "strategic" because counsel can make a reasonable decision to forego calling such witnesses only after evaluating their testimony and determining that it would not be helpful. *Milburn v. State,* 15 S.W.3d at 270. Counsel's duty to investigate and present mitigating evidence in the punishment stage is measured against an "objective standard of reasonableness . . . under prevailing professional norms." *Strickland v. Washington,* 466. U.S. at 668. By failing to interview any available witness who would have provided critical testimony in mitigation of punishment, counsel's performance was objectively deficient. *See Lair v. State,* 265 S.W.3d 580, 595 (Tex. App.—Houston [1st Dist.] 2008, pet. ref'd)("Counsel is ineffective when he fails to investigate and interview potential punishment witnesses, despite their availability and willingness to testify on [the defendant's] behalf); *Shanklin v. State,* 190 S.W.3d 154, 164 (Tex. App. – Houston [1st Dist. 2005] 2005, pet. dism'd)("a failure to uncover and present mitigating evidence cannot be justified as a tactical decision when defense counsel has not conducted a thorough investigation of the defendant's background"); *Moore v. State,* 983 S.W.2d 15, 23-24 (Tex. App.—Houston [14th Dist.] 1998, pet.

ref'd)(counsel's failure to interview and call available punishment witnesses whose testimony would have benefited defendant was objectively deficient.)

In determining if Mr. Pham was prejudiced by counsel's multiple instances of deficient conduct, he need not show that he would have received a lesser sentence, but for their errors. *Everage v. State,* 893 S.W.2d 219, 222 (Tex. App.—Houston [1st Dist.] 1995, pet. ref'd). The prejudice Mr. Pham must demonstrate is *by less than a preponderance of the evidence* because "[t]he reasonable probability standard is not the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for error things would have been different." *United States v. Dominguez Benitez,* 542 U.S. at 82 n.9. As the Supreme Court made clear, "We do not require a defendant to show 'that counsel's deficient conduct more likely than not altered the outcome' of his penalty proceeding, but rather that he establish a "probability sufficient to undermine confidence in [that] outcome." *Porter v. McCollum,* 558 U.S. 30, 43 (2009)(per curiam), citing *Strickland* v. *Washington,* 466 U.S. 693-94. On the record before this Court, Pham has done so.

First, even a single error counsel's part may be sufficient to warrant a finding of prejudice. *See Ex Parte Heidelberg*, 2006 Tex. Crim. App. LEXIS 2538 (Tex. Crim. App. 2006)(unpublished)(single error "may be sufficiently egregious, and its deleterious effect sufficiently pervasive and profound, as to undermine [a reviewing court's] confidence in the result of the trial."). *Ex Parte Felton,* 815 S.W.2d 733, 736

(Tex. Crim. App. 199l)(counsel's single error may be sufficient to undermine confidence in trial's outcome); *Branch* v. *State,* 335 S.W.3d 893, 904 (Tex. Crim. App.—Austin 2011, pet. ref'd)("The dissent suggests that the defense attorneys' failure to object... could be overlooked because by and large, [they] rendered effective assistance... throughout the trial. However, the Court of Criminal Appeals has stated otherwise."). When, as here, there are multiple errors, the cumulative effect of the attendant prejudice is more likely to undermine this Court's confidence in the outcome of proceeding. *See Greene* v. *State,* 928 S.W.2d 119, 126 (Tex. App. – San Antonio 1996, no pet.).

Second, it is painfully clear there is a reasonable probability that counsel's stark failure to call the multiple witnesses to mitigate Pham's punishment, in and of itself, was prejudicial. In determining whether Pham has proven prejudice as a result of counsel's deficient performance, this Court must juxtapose the evidence counsel introduced at the punishment stage with the wealth of mitigating evidence he would elicit at a motion for new trial hearing to determine if it paints a dramatically different picture of Pham. *Williams v. Taylor,* 529 U.S. 362, 397-98 (2000); *Ex Parte Gonzales,* 204 S.3d 391, 398 (Tex. Crim. App. 2006). In determining if Pham has demonstrated prejudice, the Supreme Court has made it clear that:

> The assessment of prejudice should proceed on the assumption that the [sentencing authority] is reasonably, conscientiously and impartially

> applying the standards that govern the [sentence]. It should not depend on the idiosyncrasies of the particular [sentence], such as unusual propensities toward harshness or leniency. Although these factors may actually have entered into counsel's selection of strategies and to that limited extent, may thus affect the performance inquiry, there are irrelevant to the prejudice inquiry. Thus, evidence about the actual process of decision, if not part of the records of the proceeding under review, and evidence about, for example, a particular judge's sentencing practices, should not be considered in the prejudice determination.

Strickland v. Washington 466 U.S. at 695.

A dispassionate review of this record evokes what the Court of Criminal Appeals has noted in a similar case, that, "We believe the mitigating evidence presented at the [post-verdict] hearing is substantially greater and more compelling that that actually presented by the applicant at his trial . . . and we conclude that the applicant's available mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of the applicant's moral culpability." *Ex Parte Gonzales,* 204 S.W3d at 399. Because this body of mitigating evidence, taken as a whole, paints a dramatically different picture of Pham than presented at the punishment stage, and would likely have caused at least one juror to strike a different balance as to sentencing, he has shown prejudice. *See Wiggins v. Smith,* 539 U.S. at 537 ("Had the jury been able to place [Appellant's] excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one

juror would have struck a different balance."); *see also Lair v. State*,[1] 265 S.W.3d at 596 ("Appellant has shown that he was actually and substantially prejudiced by his defense counsel's failure to seek out and present mitigating character evidence from these witnesses"); *Moore v. State*, 983 S.W.2d at 24 (sentence "had no character evidence before it which would have humanized appellant and offset the State's recommendation of punishment"); *Shanklin v. State*,[2] 190 S.W.3d at 166 ("We conclude that a reasonable probability exists that appellant's sentence would have been less severe had the [sentence] balanced the aggravating and mitigating circumstances."); *Milburn v. States*, 15 S.W.3d at 271 ("we find that appellant has demonstrated prejudice in this case, even though it is sheer speculation that character witnesses in mitigation would have in fact favorably influenced the . . . assessment of punishment"); *Miller v. Dretke*, 420 F.3d 356, 366 (5th Cir. 2005)(failure to present mitigating evidence at punishment stage was prejudicial where "the jury was left only with the admittedly self-serving testimony of Miller and her ex-husband regarding her mental condition, and could easily have dismissed such testimony as not credible").

[1] The defendant had been convicted of a first-degree felony and had a prior felony conviction. The jury assessed the defendant a seventy-year sentence. *Id.* at 596.

[2] The defendant was convicted of the first-degree felony of murder while he was on deferred adjudication for a first-degree felony drug offense. The jury assessed the defendant a sixty-year sentence. *Id.* at 166.

Third, and perhaps most important of all, that Pham was prejudiced by his counsel's deficient performance is fortified by the fact that he received a maximum sentence of life.

Counsels' multiplicity of deficient conduct was prejudicial enough to undermine this Court's confidence in the outcome of the punishment stage of Mr. Pham's trial. See *Johnson v. State*, 2011 WL 1902066 at *8-9 (Tex. App.—Tyler 2010, pet. ref'd)(not designated for publication)(failure to object to inadmissible extraneous offense in punishment stage was prejudicial where defendant received forty years in prison although he had no prior felony convictions). The evidence that Pham offered, both attached to the motion for new trial, introduced on the record at the "Motion for New Trial Hearing" (which was not a hearing since the trial court denied the hearing request), and which counsel was prepared to present if the trial court would have granted his request for an evidentiary hearing, which counsel neither investigated nor presented was powerful in its import and "might well have influenced the jury's appraisal of [Pham's] moral culpability." *Porter v. McCollum*, 558 U.S. at 4 (citing *Williams*, 529 U.S. at 398). This is not a case in which the admission of the mitigating evidence that counsel neither investigated nor presented "would barely have altered the sentencing profile presented to the sentencing [jury]," *Id., citing Strickland v. Washington*, 466 U.S. at 700. Given the "radical shift in terrain" Pham's case would have experienced had this substantial

body of mitigating evidence been presented, see *Miller v. Dretke,* 420 F.3d at 366, counsels' objectively deficient conduct in failing to present this evidence is more than enough to undermine this Court's confidence in the punishment verdict. Therefore, the probability that Pham would have received any sentence below the maximum sentence of life, but for counsel's deficient conduct, established prejudice in this case. *See Lumpkin v. State,* 470 S.W.3d 876, 917 (Tex. App.—Texarkana 2015, pet. ref'd).

At the end of the day, this Court cannot say whether at least one juror would not have struck a different balance as to the punishment it assessed Pham, but for counsels' deficient conduct.

Strickland and its progeny make it clear that certainty is not the standard to which this Court holds itself because the "reasonable probability" *Strickland* speaks of does not require certainty, let alone a showing that it is "more likely than not" that a different outcome would have occurred at the punishment stage. See *United States v. Dominguez Benitez,* 542 U.S. at 82 n. 9; *Porter v. McCollum,* 558 U.S at 43-44 (citing *Strickland v. Washington,* 466 U.S. at 693-694). Simply put, counsel's failure to present substantial mitigating evidence "rendered the adversarial process presumptively unreliable at punishment." *Moore v. State,* 983 S.W.2d at 24; *Milburn v. State,* 15 S.W.3d at 270-71; *Shanklin v. State,* 190 S.W.3d at 165-66; *Lair v. State,* 265 S.W.3d at 596. *Strickland* and its progeny guaranteed Pham the effective

assistance of counsel at the punishment stage of his trial. Because counsel's deficient conduct made the State's punishment case significantly more persuasive and Pham's significantly less so, the trial court abused its discretion by denying his motion for new trial on punishment. See *Kyles v. Whitley*, 514 U.S. at 441; *See* TEX. CODE OF CRIM. PROC. ART. 44.29(b).

As stated in the dissenting opinion, "Strategy without investigation is no strategy at all. The majority relies on a series of assumptions to find counsel's performance and preparation in the punishment phase of appellant's trial sufficient." *Pham v. State*, 595 S.W.3d 769, 789 (Tex. App. – Houston [14th Dist.] 2019, pet. granted)(Bourliot, J., dissenting). The dissenting opinion conveys the error in the majorities' decision:

> Trial counsel executed an affidavit in which he stated that he failed to interview any potential mitigation witnesses, he made conclusory assumptions about what those witnesses might know about appellant's life, and his decision not to interview any potential witnesses was not based on trial strategy. Twenty affidavits of potential punishment witnesses were submitted to the trial court along with appellant's motion for new trial. Each represented a potential avenue for investigation and an opportunity to present mitigating evidence to the jury. However, trial counsel assumed that these potential witnesses would be more harmful than helpful, neglected to speak to a single person, and failed to prepare for the punishment phase of the trial. In finding counsel's performance and preparation sufficient, the majority substitutes its own determination of proper trial strategy for trial counsel's—having neither interviewed witnesses nor ascertained what those witnesses would have said.
>
> Counsel's affidavit states that he made a conclusory assumption that appellant's friends and family would not have made good punishment

witnesses and this assumption, combined with his solitary focus on self-defense, caused him to conduct no investigation into any potential punishment witnesses. At punishment, no doubt surprised by the verdict, counsel threw appellant's two brothers on the witness stand to testify without having prepared either of them. As he candidly admits, counsel's failure to investigate was not based on any trial strategy. The majority presumes to know that the witnesses had no knowledge of appellant's current character, assumes that their testimony would have been harmful, and determines that counsel's failure to investigate is a reasonable strategic decision. However, this goes against a basic tenet of strategy—how does counsel strategically decide to forego calling a witness to testify if counsel has absolutely no idea what that witness might say? Similarly, how does this court deign to know what those witnesses would have said without having heard from the witnesses themselves?

The decision whether to present witnesses is largely a matter of trial strategy. *Shanklin v. State*, 190 S.W.3d 154, 164 (Tex. App.—Houston [1st Dist.] 2005, pet. dism'd). "[A]n attorney's decision not to present particular witnesses at the punishment stage may be a strategically sound decision if the attorney bases it on a determination that the testimony of the witnesses may be harmful, rather than helpful, to the defendant." *Id.* (citing *Weisinger v. State*, 775 S.W.2d 424, 427 (Tex. App.—Houston [14th Dist.] 1989, pet. ref'd)). However, a failure to present mitigating evidence "cannot be justified as a tactical decision when defense counsel has not conducted a thorough investigation of the defendant's background." *Id.* (citing *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003), and *Rivera v. State*, 123 S.W.3d 21, 31 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd)). Counsel is ineffective when he fails to investigate and interview potential punishment witnesses, despite their availability and willingness to testify on appellant's behalf, and counsel can only make a reasonable decision to forego presentation of mitigating evidence after evaluating available testimony and determining it would not be helpful. *Milburn v. State*, 15 S.W.3d 267, 270-71 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd).

The majority's reliance on *Humphrey*, and by extension *Wiggins*, in condoning the trial counsel's inaction is misplaced. Humphrey's trial counsel interviewed potential witnesses and made a strategic decision

not to present their testimony. *Humphrey v. State*, 501 S.W.3d 656, 664 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd). Humphrey's trial counsel also had the benefit of a prior parole hearing to evaluate what testimony likely would have been elicited from one potential witness. *Id.* at 663. Here, however, counsel assumed he knew what the witnesses would say and, without speaking to a single potential mitigation witness, decided that all of their testimony would have been unhelpful. Counsel's own affidavit states that "my failure to investigate the possibility that favorable punishment witnesses existed was not based on any trial strategy."

In *Humphrey*, as in *Wiggins*, the attorney knew about the evidence, made an initial investigation into the information, and then made a strategic choice not to investigate further or use the information at trial. *Wiggins*, 539 U.S. at 534; *Humphrey*, 501 S.W.3d at 663-64*; see also Burger v. Kemp*, 483 U.S. 776, 794-95, 107 S. Ct. 3114, 97 L. Ed. 2d 638 (1987). Here however, counsel did not know about the available mitigation evidence because he did absolutely no investigation into the matter. Therefore, his decision not to present mitigation evidence was not strategy. For this court to state that counsel's failure to investigate was strategic, it is effectively making a strategic decision for trial counsel based on information neither obtained nor analyzed by trial counsel. Courts are "not required to condone unreasonable decisions parading under the umbrella of strategy, or to fabricate tactical decisions on behalf of counsel when it appears on the face of the record that counsel made no strategic decision at all." *Richards v. Quarterman*, 566 F.3d 553, 564 (5th Cir. 2009).

The majority's conclusion that prioritizing appellant's self-defense claim over mitigation witnesses was strategic is also misplaced. "[A] tactical choice not to pursue one course or another 'should not be confused with the duty to investigate.'" *Bouchillon v. Collins*, 907 F.2d 589, 597 (5th Cir. 1990)(quoting *Beavers v. Balkcom*, 636 F.2d 114, 116 (5th Cir. 1981)). The majority's own words show the danger in this—in stating that these mitigation witnesses "had no knowledge of appellant's current character, or possibly had knowledge of appellant's drug-dealing activities, or possibly had helped appellant elude capture," the majority presumes to know what the witnesses would have known about the appellant and further presumes to know what testimony would have been elicited. Failure to present mitigating

evidence "cannot be justified as a tactical decision when defense counsel has not conducted a thorough investigation of the defendant's background." *Shanklin*, 190 S.W.3d at 164. Counsel had a duty to make a reasonable investigation and not rely solely on the client to provide information. *Ex parte Welborn*, 785 S.W.2d 391, 395 (Tex. Crim. App. 1990). If counsel had investigated, determined that the witnesses were unhelpful, and then decided not to call them, that is defensible trial strategy. If counsel fails to investigate, that is deficient performance.

"The sentencing stage of any case, regardless of the potential punishment, is the time at which for many defendants the most important services of the entire proceeding can be performed." *Vela v. Estelle*, 708 F.2d 954, 964 (5th Cir.1983). Where the potential punishment is imprisonment for life, as in the instant matter, the sentencing proceeding takes on added importance. *See id.*; *Milburn, 15 S.W.3d at 269.*

Strickland does not require that counsel investigate every possible line of mitigating evidence, but counsel can only make a reasonable decision to present no mitigating evidence after evaluating available testimony and determining it would not be helpful. *Milburn*, 15 S.W.3d at 270. Counsel's performance is deficient when counsel fails to conduct an investigation of a defendant's background for potential mitigating evidence. *Wiggins*, 539 U.S. at 533-35; *Milburn* at 269-70. Counsel here has admitted that he neither investigated nor evaluated any available avenues for punishment evidence.

Arguably, trial counsel's failure to investigate even a single avenue of mitigation could mean that appellant was constructively denied any defense at all in the penalty phase of his trial. "Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." *Strickland v. Washington*, 466 U.S. 668, 692, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost." *Id.* Regardless, I would find that appellant has demonstrated prejudice in this case because counsel's lack of investigation deprived appellant of bringing any meaningful mitigation evidence to the jury to offset the State's aggravating factors. The painful and joyful parts of appellant's childhood, his family's story in escaping the harsh and

> violent world of Vietnam, and his interactions and relationships with family, friends, and community members are all relevant pieces of information that the jury could have considered. I would conclude that a reasonable probability exists that appellant's sentence would have been less severe had the jury balanced knowledge of his life with the aggravating factors, particularly in light of the fact that the jury ultimately sentenced him to life in prison.

Id. 789-92 (Bourliot, J., dissenting).

In *Canon v. State*, although defense counsel was physically present in the courtroom he refused to participate and abandoned his role as advocate for the defense stating that he was simply unprepared to move forward. 252 S.W.3d 342 (Tex. Crim. App. 2008). In the usual case, appellant would have to demonstrate both deficient performance and prejudice. *See id*. at 349. "However, if an appellant can demonstrate that defense counsel 'entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing,' so that there was a constructive denial of the assistance of counsel altogether, then prejudice, because it is 'so likely,' is legally presumed." *Id*. (quoting *United States v. Cronic*, 466 U.S. 648 (1984)), (citing *Bell v. Cone*, 535 U.S. 685, 696-97 (2002)(nothing that, under *Cronic*, defense counsel's failure to test the prosecution's case must be "complete" before prejudice is presumed), *Strickland v. Washington*, 466 U.S. at 692 ("constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice"); *Ex parte McFarland*, 163 S.W.3d 743, 752-53 (Tex. Crim. App. 2005)(discussing constructive denial of counsel and presumed prejudice)).

The Texas Court of Criminal Appeals stated in *Cannon*, "[i]n determining whether defense counsel 'entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing,' we are guided by the following passage in *Cronic*:

> '[T]he adversarial process protected by the Sixth Amendment requires that the accused have 'counsel acting in the role of advocate' The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted – even if defense counsel may have made demonstrable errors – the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.' 466 U.S. at 656-657 (citation and footnotes omitted)."

Id. at 349.

In this case, trial counsel's failure to investigate even a single avenue of mitigation means appellant was constructively denied any defense at all in the penalty phase of his trial and therefore prejudice is presumed.

3. <u>The panel erred in holding that because Appellant used deadly force, rather than the threat of deadly force, he was not entitled to an instruction on self-defense pursuant to Tex. Pen. Code § 9.04</u>.

After both sides rested and closed, Appellant requested a jury instruction pursuant to Texas Penal Code § 9.04.[3] (VI R.R. at 171-74; XII R.R. at 240 of 312). The Court denied the requested jury instruction. (VI R.R. at 174).

[3] Section 9.04 states the following: the threat of force is justified when the use of force is justified by this chapter. For purposes of this section, a threat to cause death or serious bodily injury by the production of a weapon or otherwise, as long as the actor's purposes is limited to creating an apprehension that he will use deadly force if necessary, does not constitute the use of deadly force.

A new trial is required where the court has misdirected the jury about the law. TEX. R. APP. P. 21.3 (b). An erroneous or incomplete jury charge jeopardizes a defendant's right to jury trial because it fails to properly guide the jury in its fact-finding function. *Abdnor v. State,* 871 S.W.2d 726, 731 (Tex. Crim. App. 1994). That occurred when the Court denied Pham's request for an instruction pursuant to § 9.04.

The panel held that "because [Appellant] did use deadly force, rather than the threat of deadly force, he was not entitled to an instruction pursuant to section 9.04, in addition to the instruction on self-defense." *Pham*, 595 S.W.3d at 779.

A defendant has the right to controvert the facts upon which the prosecution intends to rely, and that right includes claiming that events unfolded in a way different than alleged by the State. *Bujldn v. State,* 207 S.W.3d 779, 781-82 (Tex. Crim. App. 2006); *Gamino v. State,* 480 S.W.3d 80, 88 (Tex. App.—Fort Worth 2015, pet. granted). Pham's version of the events shows that he displayed the gun for the purpose of discouraging the complainant's attack. Pham described drawing his gun to defend himself, and simply drawing a gun in this circumstance does not constitute "deadly force." *See* § 9.04; *see also Gamino v. State,* 480 S.W.3d at 89.

Pham was entitled to the instruction regardless of whether the evidence was feeble, contradicted, or not credible. *Reynolds v. State,* 371 S.W.3d 511, 521-22 (Tex. App.—Houston [1st Dist.] 2012, pet. ref'd). The evidence in support of the

instruction is viewed in a light most favorable to Pham. *See id* at 522. Additionally, whether a defendant's beliefs are reasonable under the circumstances is a fact question for the jury to decide and not a preliminary question for the trial court to resolve. *See Gamino,* 480 S.W.3d at 90.

Viewing the evidence in the light most favorable to Pham, he reasonably believed that drawing his gun was immediately necessary to protect himself against the complainant's use or attempted use of unlawful force, and Pham produced his gun to create an apprehension that he would use deadly force if necessary. It was error not to submit an instruction pursuant to § 9.04.

Mr. Pham's theory of defense was that, upon seeing the complainant reach for his weapon, Pham exhibited his weapon to show, if necessary, he would resort to using deadly force, and in fact did respond to the complainant's use of deadly force. The omission of the § 9.04 instruction completely undermined Pham's defense as the State exploited the court's error in its closing argument. (VI R.R. at 39-40).

The omitted jury instruction deprived Pham the ability to argue that the display of his gun was justified under the law. On the other hand, the State was allowed to exploit the error by arguing that Pham's lawful act of displaying his gun provoked the difficulty with the complainant and therefore argued for the jury to find against him on the issue on self-defense. (VII R.R. at 39-40, C.R. at 264-65).

Pham has suffered *some harm* as a result of the charging error. *See Arline v. State,* 721 S.W.2d 348, 357 (Tex. Crim. App. 1986).

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, appellant prays that this Honorable Court issue an opinion reversing the Court of Appeals' judgment, and remanding the case back to the trial court for a new trial.

Respectfully submitted,

/s/ Brittany Carroll Lacayo
BRITTANY CARROLL LACAYO
Texas Bar No. 24067105
The Lacayo Law Firm, PLLC
212 Stratford St.
Houston, Texas 77006
Telephone: (713) 504-0506
Facsimile: (832) 442-5033
Brittany@bcllawfirm.com

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing was delivered electronically through the electronic filing manager on October 20, 2020 to the following persons:

Kim Ogg
Harris County District Attorney
State Bar No. 15230200
Harris County District Attorney's Office
500 Jefferson St.
Houston, TX 77002
Telephone: 713-274-5800

Stacey Soule
State Prosecuting Attorney
P.O. Box 13046
Austin, Texas 78711
Telephone: (512) 463-1660
Facsimile: (512) 463-5724

/s/ Brittany Carroll Lacayo
BRITTANY CARROLL LACAYO

CERTIFICATE OF COMPLIANCE

This petition complies with TEX. R. APP. P. 9.4 because it was computer-generated and contains 10,209 words, not included words that are excluded from this word count pursuant to TEX. R. APP. P. 9.4(i).

/s/ Brittany Carroll Lacayo
BRITTANY CARROLL LACAYO

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Brittany Lacayo
Bar No. 24067105
Brittany@bcllawfirm.com
Envelope ID: 47362870
Status as of 10/21/2020 9:48 AM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Stacey Soule	24031632	information@spa.texas.gov	10/20/2020 4:13:47 PM	SENT
Kimbra Kathryn Ogg	15230200	ogg_kim@dao.hctx.net	10/20/2020 4:13:47 PM	SENT